Supreme Court, U.S.
FILED
NOV 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-717

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1988 TERM

BILLY L. ALLARD, PETITIONER
VS.
MARTHA PARTEN FRECH,
INDEPENDENT EXECUTRIX OF THE ESTATE
OF
BILLIE J. ALLARD, DECEASED, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

BRIEF OF AMICUS CURIAE, EMPLOYEE BENEFITS COMMITTEE OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STANLEY C. SIMON
GINSBERG & FORMAN, P.C.
820 HARTFORD BUILDING
DALLAS, TEXAS 75201
(214) 744-0044

ATTORNEY FOR AMICUS CURIAE

CAROL H. JEWETT
VINSON & ELKINS

CECIL A. RAY, JR.
HUGHES & LUCE

OF COUNSEL

TABLE OF CONTENTS

Table of Authorities	ii
Amicus Curiae's Interest	3
The Decision Below Will Disqualify Every Plan With A Married Texas Participant	6
The Majority Opinion Below Ignores ERISA	8
Summary of Argument	8
ERISA Preempts the Laws of The State of Texas Insofar as They Relate to Plans	9
As Applied in This Case, Texas Community Property Law and Texas Law of Testamentary Disposition Conflict with Benefit Forms and Beneficiary Designation Rules Required by ERISA and the Code	12
ERISA and The Code Permit The Division of Plan Benefits Only Under QDROs	15
The Decision Below Violates ERISA's Exclusive Benefit Rule	17
The Decision Below Violates The Plan Document Rule	18
Is ERISA an Affirmative Defense Which is Waved if Not Raised In The Trial Court?	18
Conclusion	20
Certificate of Service	21

TABLE OF AUTHORITIES

Statutes:

Bankruptcy Reform Act of 1978 6

Employee Retirement Income Security Act of 1974 (ERISA): 1,2,9,12

Section 3 [29 U.S.C. §1002] 17,18
Section 4 [29 U.S.C. §1003] 9,10
Section 205 [29 U.S.C. §1055] 9,14,15
Section 206 [29 U.S.C. §1056] 5,13,15,16
Section 403 [29 U.S.C. §1103] 17
Section 404 [29 U.S.C. §1104] 18
Section 514 [29 U.S.C. §1144] 9

Internal Revenue Code of 1986: 2,3,9,12

Section 401 [26 U.S.C. §401] 4,6,14,15
Section 402 [26 U.S.C. §402] 4
Section 404 [26 U.S.C. §404] 4
Section 414 [26 U.S.C. §414] 5
Section 417 [26 U.S.C. §417] 9,13,15
Section 501 [26 U.S.C. §501] 4

Cases:

Dueringer v. General American Life Ins. Co., 842 F.2d 127 (5th Cir. 1988) 19

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) 12

Mackey v. Lanier Collection Agency & Service, Inc., ___ U.S. ___, 108 S. Ct. 2182, 100 L Ed. 2d 836 (1988) 10

TABLE OF AUTHORITIES CONTINUED

MacLean v. Ford Motor Company, 831 F.2d 723 (7th Cir. 1987) 10,11

McCarty v. McCarty, 453 U.S. 210 (1981) 12

Pilot Life Insurance Company v. Dedeaux, 481 U.S. ___, 107 S. Ct. 1549, 1552, 95 L Ed. 2d 39, 46 (1987) 10

Ridgeway v. Ridgeway, 454 U.S. 46 (1981) 12

Treasury Regulations (26 C.F.R.):

§ 1.401-1(a)(3)(ii) 6
§ 1.401-1(b)(1) 6

Revenue Rulings:

72-241, 1972-1 C.B. 108 6,7
74-360, 1974-2 C.B. 130 7

IRS Letter Rulings:

8010051 5
8131020 5
8811052 5

Miscellaneous:

5 Texas Jur. (Third Edition), Appellate Review §593, p. 307 (1980) 19

No. 88-717

IN THE SUPREME COURT OF THE UNITED STATES

October 1988 Term

BILLY L. ALLARD, Petitioner
vs.
MARTHA PARTEN FRECH,
Independent Executrix of the Estate
of
BILLIE J. ALLARD, Deceased, Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

BRIEF OF AMICUS CURIAE, EMPLOYEE BENEFITS COMMITTEE OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus curiae, Employee Benefits Committee of the Section of Taxation of the State Bar of Texas, supports the petition for writ of certiorari because the Supreme Court of Texas has decided important questions of federal law that have not been, but should be, settled by this Court: Does the Employee Retirement In-

come Security Act of 1974, as amended ("ERISA"),[1] preempt either Texas community property law after the death of a pensioner or his spouse or the Texas laws of testamentary disposition (or intestate succession) to the extent that they relate to a spouse's community property interest in a Plan.[2] Is ERISA an affirmative defense which is waived if not raised in the court of first instance? The second question was not raised, and could not have been raised, in the trial court. (If Petitioner had raised the ERISA issues in the trial court, the waiver question would never have arisen.) This case also involves the Internal Revenue Code of 1986,

---

[1]Citations throughout this brief are to the provisions of ERISA or the Internal Revenue Code; see the Table of Authorities for parallel U.S.C. citations.

[2]As used in this brief, the terms "Plan" and "Plans" refer to any employee retirement income or deferred compensation arrangement regulated by ERISA.

as amended (the "Code").

AMICUS CURIAE'S INTEREST

Amicus curiae is interested in this litigation because its members draft Plans for employers, advise employers about the administration of Plans, advise Plan fiduciaries (trustees and plan administrators) about their duties, represent employers and Plan fiduciaries before the Internal Revenue Service (IRS) and in the courts with respect to Plans, prepare estate plans, wills, and trusts for participants in Plans and their beneficiaries, probate estates of participants in Plans, and advise participants in Plans about federal tax questions relating to their Plan benefits. It is important that a Plan be qualified for federal tax purposes, because disqualification has four Draconian consequences.

First, under Code Sec. 404(a), employer payments to a stock bonus, pension, profit-sharing, or annuity plan generally not deductible unless the plan is qualified under Sec. 401(a), except to the extent allocated to nonforfeitable individual accounts. Second, under Code Sec. 402(b), such allocations are taxable currently to the participants. Third, under Code Sec. 402, the favorable tax treatment provided for the beneficiary of a stock bonus, pension, or profit-sharing trust is only available if the trust is qualified under Sec. 401(a). Fourth, under Code Sec. 501(a), a stock bonus, pension, or profit-sharing trust is not exempt from income tax unless it is qualified under Sec. 401(a).

If a Plan obeys a court order directing payment of a participant's benefit to

any person other than the participant or his duly designated beneficiary, its qualified (tax-exempt) status will, according to IRS rulings, be adversely affected unless the order is a qualified domestic relations order (QDRO), i.e., one which complies with ERISA Sec. 206(d)(3)(B) and Code Sec. 414(p). See Letter Ruling 8811052, December 22, 1987, in which the IRS ruled that a Plan could obey a court order requiring payment of alimony to a participant's former wife, because the order was a QDRO. Cf. Letter Ruling 8010051, December 12, 1979, in which the IRS ruled that a Plan would be disqualified if it obeyed a court order requiring payment of back alimony before benefits would be in pay status under the Plan, and Letter Ruling 8131020, May 5, 1981, in which the IRS ruled that obeying a United

States Bankruptcy Court pension deduction order in proceedings under Chapter 13 of the Bankruptcy Reform Act of 1978 would disqualify a Plan.

Plans hold a large proportion of the national wealth. A substantial fraction of the nation's population resides, or has resided, in community property states. Certainty in the law governing the qualification of Plans as tax-exempt entities is essential.

THE DECISION BELOW WILL DISQUALIFY EVERY PLAN WITH A MARRIED TEXAS PARTICIPANT

Code Sec. 401(a) and Treas. Reg. §1. 401-1(a)(3)(ii) require a Plan to be for the exclusive benefit of employees and their beneficiaries. Treas. Reg. §1.401-1(b)(1) permits incidental death benefits. Rev. Rul. 72-241, 1972-1 C.B. 108, provides that a settlement option under a Plan will satisfy the requirement

> . . . that benefits payable to the beneficiary of an employee must be incidental to the primary purpose of distributing accummulated funds to the employee, if it contains certain provisions whereby the present value of the payments to be made to the participant is more than 50 percent of the present value of the total payments to be made to the participant and his beneficiaries. [Emphasis supplied.]

Rev. Rul. 74-360, 1974-2 C.B. 130, provides that Rev. Rul. 72-241 "does not permit distributions to persons other than the participant prior to his death."

The decision below violates both of these requirements. It awards 50 percent of Petitioner's pension to Respondent, thus failing to leave him more than 50 percent of the total payments. It awards this 50 percent now, prior to Petitioner's death. If the decision below stands as the law applicable to Plans with married Texas participants, every such Plan will fail to meet the requirements that bene-

fits to persons other than participant be only incidental to the participant's benefits and that, while the participant lives, benefits be paid only to the participant.

THE MAJORITY OPINION BELOW IGNORES ERISA

Five justices of the Supreme Court of Texas did not even explain why ERISA is not relevant to this case. The Chief Justice concurred only because the ERISA issue was not raised in the trial court. Three justices dissented because they thought ERISA compelled the opposite result.

SUMMARY OF ARGUMENT

Under controlling federal law regulating Plans, Plan benefits can be community property as long as both parties live, and can be divided by the court in the event of divorce by means of a QDRO; but, when one spouse dies, the other must

be entitled to 100 percent of the Plan benefits, unless the survivor has consented to a different beneficiary designation in the manner prescribed by ERISA Sec. 205(c) and Code Sec. 417(a).

ERISA PREEMPTS THE LAWS OF THE STATE OF TEXAS INSOFAR AS THEY RELATE TO PLANS

ERISA Sec. 514(a) contains a broad preemption provision under which ERISA[3] preempts

> . . . any and all State laws[4] insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [of ERISA] and not exempt under section 4(b) [of ERISA].

The breadth of ERISA's preemptive provision was recently emphasized by this Court, as follows:

---

[3]The Code does not preempt state law like ERISA, but violating the Code produces the draconian results described above.

[4]ERISA Sec. 514(c)(1) broadly defines "State law" as including "all laws, decisions, regulations, or other State action having the effect of law, of any State."

> . . . the express preemption provisions of ERISA are deliberately expansive, and designed to "establish pension plan regulation as exclusively a federal concern. Pilot Life Insurance Company v. Dedeaux, 481 U.S. _____, 107 S.Ct. 1549, 1552, 95 L Ed. 2d 39, 46 (1987).

The General Dynamics Corporation's pension plan (GDC Plan) is described in ERISA Sec. 4(a) and is not exempt under ERISA Sec. 4(b).

This case presents an outstanding opportunity for this Court to clarify the application of its decision in Mackey v. Lanier Collection Agency & Service, Inc., ____ U.S. ____, 108 S. Ct. 2182, 100 L Ed. 2d 836 (1988).

The prevailing view of the extent of ERISA preemption of state law is illustrated by MacLean v. Ford Motor Company, 831 F.2d 723 (7th Cir. 1987), which involved typical facts -- the beneficiaries of the decedent's probate estate and the

beneficiaries designated by the decedent under Ford's retirement plan were different persons. The court could have decided the case the same way merely by holding that the retirement benefits were a nonprobate asset whose disposition was controlled by the contract -- the beneficiary designation filed by the decedent with the plan. Instead, the court found that the state testamentary law had a connection with the plan because, if applied, state law would determine the distribution of the assets under the plan. Therefore, the state testamentary law related to the Ford plan and was preempted by ERISA. See also the cases cited in MacLean, supra.

The decision below is contrary to the trend in this Court, which found federal preemption of state community property law in the case of Railroad Retirement Act

benefits, Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), military retired pay, McCarty v. McCarty, 453 U.S. 210 (1981), and Servicemen's Group Life Insurance, Ridgeway v. Ridgeway, 454 U.S. 46 (1981).

AS APPLIED IN THIS CASE, TEXAS COMMUNITY PROPERTY LAW AND TEXAS LAW OF TESTAMENTARY DISPOSITION CONFLICT WITH BENEFIT FORMS AND BENEFICIARY DESIGNATION RULES REQUIRED BY ERISA AND THE CODE

There is no indication in the statutes or legislative histories that Congress intended to distinguish between participants and spouses in common law states and those in community property states or that Congress intended for state community property laws to invalidate the requirements of ERISA and the Code. No purpose for such a rule is apparent in the statute or legislative histories. There is no reason to believe that Congress intended that a participant or spouse who received qual-

ified retirement plan benefits would hold half of them in a constructive trust for the deceased spouse's heirs or legatees. A divorce court can divide Plan benefits between the participant and his[5] spouse, if the requirements for a QDRO are satisfied. See ERISA Sec. 206(d)(3)(B) and Code Sec. 417. Upon death of either, however, his interest in the Plan must cease.

To hold otherwise would lead to illogical consequences, which Congress could not have intended. For example, in the case of a profit-sharing or stock bonus plan which did not provide annuities, if a Texas participant died first, the balance in his account would have to be payable to his spouse because he could not have elected otherwise without her consent.

---

[5]For convenience, the masculine pronoun is used through-out this brief; but the law applies equally to female participants with male spouses.

See paragraphs (b)(1)(C)(i) and (c)(2) of ERISA Sec. 205 and Code Sec. 401(a)(11)(B)(iii). On the other hand, if his spouse died first, 50 percent of the then account balance would pass to the spouse's heirs. Congress could not have intended such an inequitable result.

If the parties resided in a common law state, a participant in a profit-sharing or stock bonus plan would be entitled to all the benefits as long as he lived, no matter when his spouse died. Whatever was left in the account when the participant died would automatically be paid to his spouse. There is no reason to believe that Congress intended a different result in community property states. If Congress intended a different result, it would have said so; it would not have expected state courts to apply the constructive trust

doctrine.

In the case of defined benefit pension plans, money purchase pension plans, and annuity plans, where qualified preretirement survivor annuities and qualified joint and survivor retirement annuities are required by ERISA Sec. 205(a) and Code Sec. 401(a)(11) and Sec. 417, Congress was similarly concerned only with the participant and his spouse. If Congress had intended different results in common law and community property states, it would have spelled out those results in the statute; it would not have expected the state courts to apply the constructive trust doctrine.

ERISA AND THE CODE PERMIT THE DIVISION OF PLAN BENEFITS ONLY UNDER QDROS

ERISA Sec. 206(d)(1) requires every pension plan to "provide that benefits

provided under the plan may not be assigned or alienated." ERISA Sec. 206(d)(3)(A) provides an exception to this nonassignment and nonalienation rule for payments made under QDROs. To qualify as a QDRO, an order must be a domestic relations order, which ERISA Sec. 206(d)(3)(B)(ii) defines as follows:

> the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--
>
> > (I) relates to the provisions of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
> >
> > (II) is made pursuant to a State domestic relations law (including a community property law).

The order entered in this case does not qualify as a "domestic relations order." It would be illogical to read this statute as including an

> . . . order . . . which . . . relates to the provision of . . . marital property rights to a . . . child or other dependent of a participant . . . .

Congress intended only to permit an order to provide child support to a child or other minor dependent of a participant. Alimony payments and marital property rights can only be awarded to a spouse or former spouse.

THE DECISION BELOW VIOLATES ERISA'S EXCLUSIVE BENEFIT RULE

ERISA Sec. 403(c)(1) provides that (with exceptions not relevant to this case)

> . . . the assets of a plan . . . shall be held for the exclusive purposes of providing benefits to the participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

ERISA Sec. 3(7) defines the term participant as

> . . . any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such

> employer. . . or whose beneficiaries may be eligible to receive such benefits.

ERISA Sec. 3(8) defines the term "beneficiary" as

> . . . a person designated by a participant, or by the terms of an employee benefit plan, who is or may be entitled to a benefit thereunder.

Respondent is not a participant or beneficiary in the GDC Plan.

THE DECISION BELOW VIOLATES THE PLAN DOCUMENT RULE

ERISA Sec. 404(a)(1)(D) requires a fiduciary to discharge his duties with respect to a Plan solely in the interest of the participants and beneficiaries and in accordance with the documents and instruments governing the Plan. The GDC Plan, like all Plans, permits payment only to participants and beneficiaries, or as provided in a QDRO.

IS ERISA AN AFFIRMATIVE DEFENSE WHICH IS WAIVED IF NOT RAISED IN THE TRIAL COURT?

Petitioner did not raise the ERISA issues in the lower Texas courts. Did he waive this defense? See Dueringer v. General American Life Ins. Co., 842 F.2d 127 (5th Cir. 1988). For a similar Texas rule, see 5 Texas Jur (Third Edition), Appellate Review, §593, p.307 (1980). This federal question (and the parallel state question) could not have been raised in the court of first instance because, if Petitioner had raised the ERISA issues in the trial court, the waiver question would not be in this case.

CONCLUSION

Amicus curiae requests this Court to grant the petition for writ of certiorari and to decide the important federal questions inherent in this case under ERISA.

Stanley C. Simon
Ginsberg & Forman, P.C.
820 Hartford Building
Dallas, Texas 75201
(214) 744-0044

Attorney for Amicus Curiae

Carol H. Jewett
Vinson & Elkins

Cecil A. Ray, Jr.
Hughes & Luce

Of Counsel

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief of Amicus Curiae, Employee Benefits Committee of the Section of Taxation of the State Bar of Texas, in Support of Petition for Writ of Certiorari were served on Henry E. Kerry, Esq., Kerry & Forderhase, Suite 900 River Plaza, 1700 River Run, Fort Worth, Texas 76107, and John R. Lively, Esq., Fort Worth Club Tower, Suite 1130, Fort Worth, Texas 76102, by depositing them in the U.S. mail, postage prepaid, on November _____, 1988.

Stanley C. Simon